



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

July 26, 1996

The Honorable Tom Craddick
Chair
House Committee on Ways and Means
Texas House of Representatives
P.O. Box 2910
Austin, Texas 78768-2910

Letter Opinion No. 96-081

Re: Whether an appraisal review board member may serve as an alternate election judge in a municipal election, and related questions (ID# 38716)

Dear Representative Craddick:

You ask whether an appraisal review board member may serve as an "alternate precinct/election judge" in a municipal election. You suggest that the Tax Code may permit an appraisal review board member to do so. Chapter 6, subchapter C of the Tax Code establishes appraisal review boards. While several provisions govern the eligibility and conflicts of interests of appraisal review board members, these statutory provisions¹ do not specifically address this kind of dual office holding and, in any event, would not supersede any constitutional prohibition. The Texas Constitution, article XVI, section 40 prohibits a person from simultaneously holding more than one "civil office of emolument." Thus, we must address whether an appraisal review board member is prohibited from serving as an alternate election judge under this constitutional provision.

We assume from your letter that the appraisal review board member was appointed to serve as an alternate election judge for a single municipal election. We need not address whether an appraisal review board member holds a civil office of emolument,² because we conclude that an alternate election judge who is appointed to serve in a single municipal election is not an officer. The appointment and eligibility of election judges and clerks in a municipal election are governed by chapter 32 of the Election Code, unless superseded by provisions in a home-rule city charter. See Elec. Code §§ 32.011(a), .035,

¹See Tax Code §§ 6.41(c), .412, .413; see also *infra* note 8.

²We do note, however, that appraisal review board members are entitled to a per diem. Tax Code § 6.42(c). Given that appraisal review board members are also entitled to reimbursement for their actual and necessary expenses in addition to this per diem, see *id.*, the per diem appears to be compensatory in nature. When a per diem associated with an office represents compensation as opposed to reimbursement for expenses, the office is "an office of emolument" for purposes of article XVI, section 40. See *Willis v. Potts*, 377 S.W.2d 622 (Tex. 1964); Attorney General Opinion JM-349 (1985) at 3.

.056.³ Section 32.001 of the Election Code provides for the appointment of a presiding election judge and an alternate election judge for each election precinct in which an election is held. *Id.* § 32.001(a). An alternate presiding judge serves as the presiding election judge if the regularly appointed election judge cannot serve. *Id.* § 32.001(b). In an election conducted by the regularly appointed election judge, the presiding judge is required to appoint the alternate presiding judge as an election clerk. *Id.* § 32.032.⁴

Section 32.005 of the Election Code provides that the governing body of a political subdivision other than a county shall appoint presiding and alternate election judges and may determine whether appointments are for a single election or for a definite term not to exceed two years.⁵ Judicial decisions and prior opinions of this office conclude that an officer has duties that are continuing in nature and not intermittent. *See generally* Attorney General Opinion JM-847 (1988) at 3-5. Examples of appointments that lack sufficient duration to constitute an office include an attorney's appointment to represent the state in single case, a juror's selection to sit on a jury, and a special commissioner's appointment to serve in a single condemnation proceeding. *See id.* Under this line of authority, an election judge with an appointment for a single election does not hold an office. It appears from your letter that the appraisal review board member at issue served as an alternate election judge in one municipal election, and that the member was not appointed to a definite term.⁶ Assuming that this is the case, we conclude that the appraisal review board member's service as alternate election judge did not constitute an office and therefore did not run afoul of article XVI, section 40.⁷

Although the constitution does not preclude an appraisal review board member from serving as an alternate election judge in a single municipal election, we must also

³You have not provided us with information about any municipal charter provisions that might apply.

⁴Both an election judge and clerk are entitled to compensation for services rendered at a precinct polling place at an hourly rate not to exceed six dollars, Elec. Code § 32.091(a), and may also receive up to twenty-five dollars as compensation for transporting election records and supplies, *id.* § 32.092(a). Thus, an alternate election judge is entitled to compensation regardless of whether he or she serves in an election as the judge or as a clerk.

⁵*See also id.* § 32.001 ("A presiding judge and an alternate presiding judge shall be *appointed* for each election in which an election is held.") (emphasis added).

⁶We do not consider here whether an alternate election judge who is appointed to serve for a definite term is an officer. *Cf.* Attorney General Opinion C-792 (1966) (characteristics of election clerk's services do not make him officer as term is used in Tex. Const. art. XVI, § 40).

⁷We also assume that there is no municipal charter provision to the contrary. *See* Elec. Code §§ 32.011(a), .035, .056 (statutory provisions regarding appointment and eligibility of municipal election judges and clerks may be superseded by provisions in home-rule city charter).

consider whether the common-law doctrine of incompatibility bars such service.⁸ The common-law doctrine of incompatibility prevents one person from holding two offices if the duties are inconsistent or in conflict, or if one office is subordinate to the other. *Thomas v. Abernathy County Line Indep. Sch. Dist.*, 290 S.W. 152 (Tex. Comm'n App. 1927, judgm't adopted); *see also* Attorney General Opinion JM-1266 (1990). It also prevents a public employee from holding a public office which appoints, supervises, and controls the employee. *See Ehlinger v. Clark*, 8 S.W.2d 666 (Tex. 1928); Letter Advisory No. 114 (1975).

We have already established that an alternate election judge appointed to serve in a single municipal election does not hold an office. Thus, the individual who serves as an alternate election judge in a single municipal election and as an appraisal review board member does not hold two incompatible offices. Nor is there any relationship of supervision or accountability between the alternate election judge and the appraisal review board member. Accordingly, the common-law doctrine of incompatibility does not bar an appraisal review board member from serving as an alternate election judge in a single municipal election.

You ask also whether an appraisal review board member who resigns by assuming a second office is eligible to serve another term or to serve an additional year for the last term to which he was appointed. Members of an appraisal review board are appointed by resolution of a majority of the appraisal district board of directors. Tax Code § 6.41(d). A vacancy on an appraisal review board is filled in the same manner as a regular appointment for the unexpired portion of the term. *Id.* Assuming the former member is currently eligible to serve on the appraisal review board⁹ and is no longer holding the second office, the appraisal district board of directors could appoint him to serve the unexpired portion of his term or a new two-year term. If he is appointed to serve the unexpired portion of his term, then his appointment would expire at the end of the term.¹⁰

⁸We are not aware of any statute which would make an appraisal review board member ineligible to serve as an election judge, or vice versa. Section 6.413 of the Tax Code provides that "[a]n individual is not eligible to be appointed to or to serve on the appraisal review board established for an appraisal district if the individual . . . is a party to a contract with the appraisal district or with a taxing unit that participates in the appraisal district." Tax Code § 6.413(a). We do not believe that a municipal order appointing an election judge to serve in a single election constitutes a contract for purposes of this provision. *See also* Elec. Code §§ 32.051 - .056 (eligibility requirements for election judges and clerks).

⁹*See* Tax Code §§ 6.41(c), .412, .413 (eligibility requirements).

¹⁰In addition, you ask, "[D]oes the staggered appointment schedule not suggest that Board member was indeed appointed to serve a two-year term not one unexpired term at the time of his most recent appointment?" Appraisal district members serve staggered, two-year terms. *See* Tax Code § 6.41(e). After making the initial appointments which will include some one-year terms, *see id.* ("In making the initial appointments, the board of directors shall designate those members who serve terms of one year."), the appraisal district board of directors' authority to appoint appraisal review board members is limited to appointing members to two-year terms or filling vacancies, *see id.* § 6.41(d), (e). An

S U M M A R Y

An appraisal review board member is not ineligible to serve as an alternate election judge in an election of a municipality when the election-judge appointment is limited to a single election.

Yours very truly,

A handwritten signature in black ink, appearing to read "Mary R. Crouter". The signature is fluid and cursive, with a long horizontal stroke at the end.

Mary R. Crouter
Assistant Attorney General
Opinion Committee

(footnote continued)

appraisal district board of directors may not fill a vacancy in a partially-completed two-year term by appointing a member to a two-year term. If the appraisal district board of directors' resolution appointing a member provides that he or she is appointed to fill a vacancy, then that member serves for the unexpired portion of the term. *See id.* A member appointed to fill a vacancy that occurs during a two-year term would not have an appointment to a two-year term.